No. 06-939

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SUPREME COURT, U.S

In The Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, ET AL.,

Petitioners,

v.

EDMUND G. BROWN JR., in his capacity as Attorney General of the State of California, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether California Government Code sections 16645.2 and 16645.7, which prohibit state grant and program fund recipients from using those state funds "to assist, promote, or deter union organizing," but place no restrictions on the recipients' use of other funds, are preempted by the National Labor Relations Act, 29 U.S.C. §§ 151-169.

PARTIES TO THE PROCEEDINGS

Respondents accept the listing of the Parties to the Proceedings set forth in the Petition for a Writ of Certiorari except that respondent Bill Lockyer, Attorney General, in his capacity as Attorney General of the State of California appears by his successor in that capacity, Edmund G. Brown Jr., and respondent Diana M. Bonta, R.N., Dr. P.H. as the Director of the California Department of Health Services, appears by her successor in that capacity, Sandra Shewry.

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BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

At issue is a 12-3 en banc panel decision of the United States Court of Appeals for the Ninth Circuit holding that the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA) does not deprive California of its authority, reserved to the states by the Tenth Amendment, to prohibit recipients of state grant or program funds from using those state funds to support or oppose union organizing. Respondents submit that certiorari review is unwarranted as petitioners have failed to satisfy any of this Court's grounds for granting their petition.

First, there is no conflict among the circuits as to the actual holding reached by the en banc panel. The recent Second Circuit opinion on which petitioners heavily rely in seeking certiorari review, *Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006), *pet'n for rehearing pending* (hereinafter *Healthcare Ass'n*), is the only other circuit to address an NLRA preemption challenge to a similar statute. Consistent with the Ninth Circuit's decision, the Second Circuit in *Healthcare Ass'n* held that the New York statute at issue was *not* preempted by the NLRA as applied to state grant funding. Further, reasoning that other applications of the New York statute (some of which appear analogous to California's program fund provisions) may or may not be preempted depending on future development of the record, the Second Circuit remanded the case for further fact-finding and proceedings. That remand was entirely consistent with the Ninth Circuit's ruling, as against a facial challenge, that California's law is not preempted with respect to program funds. The Ninth Circuit, like the Second Circuit, has left for another day the issue of whether spending restrictions

might be preempted as applied to specific forms of state program funding. *See* Appendix to Petition for a Writ of Certiorari (Pet. App.) 34a (explaining that appeal involved a facial challenge).

Second, this case's current procedural posture renders it a poor vehicle to address the legal issues raised by petitioners. This case arises from the district court's grant of a partial summary judgment only. There are a number of issues that remain to be resolved on remand, including petitioners' challenge to provisions of the California law that prohibit recipients of certain state *contract* funds from using those funds to support or oppose union organizing. *See* Cal. Gov't Code §§ 16645.1, 16645.3, 16645.4.

Moreover, the record is devoid of any factual findings, other than as to petitioners' standing to challenge the California law's grant and program provisions, and there remain disputes that have yet to be adjudicated about the proper interpretation of those provisions of the state law that were the subject of the district court's decision.

Third, petitioners note that legislation similar to AB 1889 has been proposed in 15 other states. Such legislation, if enacted, could well result in the First, Third, Fifth, Seventh, Eighth and Eleventh Circuits, in addition to the Second and Ninth Circuits, issuing decisions that are directly relevant to petitioners' arguments. Thus, rather than stepping in prematurely to grant certiorari on a case that presents a facial challenge only, this Court should allow the issues to more sufficiently percolate in the lower courts and wait to see if a conflict among the circuits in fact develops, and if so, the Court could select a case for review that has a far more developed factual record than provided in this case.

Finally, the Ninth Circuit's en banc decision, joined by 12 judges, is well-reasoned, does not conflict with Supreme Court precedent and is entirely correct.

For all these reasons, respondents submit that this Court should deny certiorari.

STATEMENT OF THE CASE

1. Overview of the California Law

AB 1889, Cal. Gov't Code §§ 16645-16649, enacted by the California legislature in 2000, prohibits employers from using certain state funds and facilities for the purpose of supporting or opposing unionization. 2000 Cal. Stat., Ch. 872. The core components of AB 1889 at issue in this petition are the statute's prohibition against an employer's use of state grant or program funds "to assist, promote, or deter union organizing." Cal. Gov't Code §§ 16645.2, 16645.7.

AB 1889's restrictions are limited to the use of state grant and program funds, and do not prohibit recipients of those funds from spending their non-state funds on union-related activities. *See, e.g.*, Cal. Gov't Code § 16645.7(a) ("A private employer receiving state funds . . . shall not use any of *those* funds to assist, promote, or deter union organizing." (emphasis added)).

AB 1889 is not a novel law. Congress has enacted several laws with similar restrictions on the use of federal funds. For example, the Workforce Investment Act requires "[e]ach recipient of funds . . . [to] provide to the Secretary assurances that none of such funds will be used to assist, promote, or deter union organizing." 29 U.S.C.

§ 2931(b)(7); *see also* the National and Community Service Act, 42 U.S.C. § 12634(b)(1) ("Assistance provided under this subchapter shall not be used by program participants and program staff to . . . assist, promote, or deter union organizing."); and the Head Start Programs Act, 42 U.S.C. § 9839(e) (prohibiting the use of appropriated funds "to assist, promote, or deter union organizing").

AB 1889 requires employers who receive state grant or program funds to certify that those state funds will not be used to assist, promote or deter union organizing. Cal. Gov't Code §§ 16645.2(c), 16645.7(b). Recipients must also "maintain records sufficient to show that *state funds* have not been used" for those purposes and must provide those records to the Attorney General upon request. Cal. Gov't Code § 16645.2(c) (emphasis added); *see also* Cal. Gov't Code 16645.7(c). AB 1889 states that, "[f]or purposes of accounting for expenditures, if state funds and other funds are commingled, any expenditures to assist, promote, or deter union organizing shall be allocated between state funds and other funds on a pro rata basis." Cal. Gov't Code § 16646(b). However, AB 1889 expressly provides that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648.

An employer who violates AB 1889 is liable for the amount of the state funds spent on activities supporting or opposing union organizing, a civil penalty of twice the amount of the expenditure, and reasonable attorney's fees and costs. Cal. Gov't Code §§ 16645.2(d), 16645.7(d), 16645.8(d).

2. The District Court Proceedings

Petitioners filed a motion for summary judgment requesting the district court to invalidate AB 1889 on a number of grounds, including NLRA preemption. Pet. App. 140a.

The district court granted petitioners' motion for summary judgment in part. Pet. App. 140a, 149a. The court concluded that petitioners had not yet established standing to challenge any provision of AB 1889 other than California Government Code sections 16645.2 and 16645.7, which apply to state grant and program funds. Pet. App. 142a-144a; Joint Excerpt of Record for Defendants-Appellants and Intervenors-Appellants filed with the Ninth Circuit (ER) 271-272. The district court then ruled that Sections 16645.2 and 16645.7 are "preempted [by the NLRA] because [they] regulate[] employer speech about union organizing under specified circumstances, even though Congress intended free debate." Pet. App. 147a.

Other than those facts related to plaintiffs' standing, the district court's summary judgment decision did not identify any facts that the court had determined to be undisputed. Pet. App. 140a-149a.

After granting summary judgment in part, the district court entered a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) declaring California Government Code sections 16645.2 and 16645.7 "invalid as applied to employers covered by the [NLRA]" and enjoined respondents from enforcing those provisions. ER 259-260, 272. The court stayed the remaining portions of the case pending appeal. ER 272-273.

3. Decision of the Court of Appeals

The Ninth Circuit initially issued a panel opinion affirming the district court. On rehearing, the court withdrew that decision and issued a new opinion, again affirming the district court, but this time with a dissent. The Ninth Circuit then reheard the case en banc. The en banc court issued a 12-3 decision that reversed the district court's grant of partial summary judgment and remanded the case for further proceedings consistent with its opinion. Pet. App. 2a, 36a.

The en banc court first explained that a facial challenge to legislation is "'the most difficult challenge to mount successfully, since *the challenger must establish that no set of circumstances exists under which the Act would be valid.*'" Pet. App. 7a (*quoting Rust v. Sullivan*, 500 U.S. 173, 183 (1991), emphasis added). Then, after determining that AB 1889's grant and program provisions do not fall within the "market participant exception" to NLRA preemption (Pet. App. 11a-12a), the en banc panel held that AB 1889's grant and program provisions are not preempted under the "*Machinists*" or "*Garmon*" preemption doctrines, doctrines established by this Court in, respectively, *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission* (*Machinists*), 427 U.S. 132 (1976) and *San Diego Building Trades Council v. Garmon* (*Garmon*), 359 U.S. 236 (1959). Pet. App. 12a-13a, 36a.

Central to the en banc court's analysis and holding is the distinction between restrictions on "the *use* of state funds," which do not preclude the recipient from using its own funds to engage in activities the state does not wish to subsidize, and conditions upon "the *receipt* of state funds,"

such as requiring recipients to remain neutral in union organizing disputes as a condition of receiving state money. Pet. App. 17a. The court recognized that the AB 1889 provisions fall within the former category. *Id.*

Accordingly, the en banc panel determined that AB 1889's grant and program provisions are not preempted under *Machinists*, as that doctrine "requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces,' . . . in a 'zone free from all regulations, whether state or federal.'" Pet. App. 13a, *quoting Machinists*, 427 U.S. at 140 and *Building & Constr. Trades Council v. Associated Builders & Contractors* (*Boston Harbor*), 507 U.S. 218, 226 (1993). As the en banc panel explained, it is "implausible" that Congress would have intended the use of state grant and program funds to be left to the free play of economic forces, "when the state's choices of how to spend its funds are by definition not controlled by the free play of economic forces." Pet. App. 16a-17a.

The en banc court also reasoned that the very similar restrictions on the use of federal government funds adopted by Congress, (*see* this Opposition at pp. 3-4), are inconsistent with the view that California is regulating "'conduct intended to be unregulated.'" Pet. App. 21a (*quoting Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986)).

With respect to *Garmon*, the Ninth Circuit held that California's law does not interfere with employer speech rights protected by 29 U.S.C. § 158(c) (section 8(c)) of the

NLRA.[1] Pet. App. 23a-25a. The en banc court reasoned that section 8(c) "does not *grant* employers speech rights" in the sense necessary for *Garmon* preemption; rather, as the plain words of the NLRA indicate, that statute "simply prohibits their noncoercive speech from being used as evidence of an unfair labor practice." Pet. App. 23a.

The en banc panel observed that section 8(c) "'merely implements the First Amendment,'" (Pet. App. 23a, *quoting NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)), and correctly applied Supreme Court First Amendment precedent, which permits restrictions upon the use of government funds so long as "employers remain free to use their own funds to advocate for or against unionization and are not required to accept neutrality as a condition for receipt of state grant and program funds." Pet. App. 25a (*citing Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983); *Rust v. Sullivan*, 500 U.S. at 193; *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The en banc panel further concluded that AB 1889's grant and program provisions do not intrude on an area that was "arguably – but not definitely – prohibited or protected" by the NLRA. Pet. App. 25a (*citing Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters* (*Sears*), 436 U.S. 180, 188 (1978)); Pet. App. 32a. The en banc panel recognized that under AB 1889, a California state court "would determine only whether an employer used state grant or program funds to influence employees, not whether that attempt violated the NLRA."

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[1] Section 8(c) provides that,"[t]he expressing of any views . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Pet. App. 28a. The majority thus concluded that there is neither a sufficient identity of issues nor a risk that a state tribunal, while applying state law, could misinterpret federal law to warrant preemption under the *Sears* criteria. Pet. App. 28a-29a.

The en banc court also determined that AB 1889 would fall within the *Garmon* exception for the regulation of "'interests . . . deeply rooted in local feeling and responsibility.'" Pet. App. 30a (*quoting Garmon*, 359 U.S. at 243-44). The court reasoned that "a state's effort to ensure that those who accept its grant and program funds use them for the purpose for which they were given . . . is of at least as great a concern to the state as its power to regulate" in other areas held to fall within this exception. Pet. App. 31a (footnotes omitted).

Three dissenting judges would have held AB 1889 to be preempted under both the *Garmon* and *Machinists* doctrines on the ground that it "stifles employers from fully participating in organizing and exercising the rights that are explicitly granted to them by Congress under the NLRA." Pet. App. 36a. In reaching this conclusion, the dissenters interpreted the state statute to "co-opt[] the payment for goods and services and profit realized under a contract." Pet. App. 36a. The 12-judge majority rejected this interpretation, pointing out that the appeal involved a facial challenge only, and further, the contract provisions of AB 1889 were not before the court. Pet. App. 34a & n. 22.

The majority also noted that respondents had acknowledged that the law's restrictions would *not* apply to employers' own funds, including, for example, "legitimately distributed corporate dividend[s]" reinvested in the corporate entity, which the court recognized were, "itself,

the fruit of the receipt of state grant or program funds." Pet. App. 32a n. 20. The majority further observed that "[t]he dissent also disregard[ed] the nature of state programs, which are run to serve public purposes and need not guarantee a profit to private companies." Pet. App. 35a n. 23.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS NOT WARRANTED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE HOLDING REACHED BY THE NINTH CIRCUIT

1. The Holdings of the Ninth and Second Circuits Are Not in Conflict

Petitioners' contention that there is a sufficient conflict between the Ninth Circuit's decision and that of the Second Circuit in *Healthcare Ass'n*, 471 F.3d 87 to warrant this Court's review is without merit.[2]

At issue in *Healthcare Ass'n* was New York Labor Law section 211-a (section 211-a) which provides, in relevant part, that "no monies appropriated by the state for any purpose shall be used or made available to employers" to pay for activities to "encourage or discourage union organization," including, among other expenditures, the hiring of consultants for those purposes. *Healthcare Ass'n*, 471 F.3d at 90-91.

[2] On February 16, 2007, the Second Circuit directed the plaintiffs to file a response to defendants' petition for rehearing by March 18, 2007.

The Second Circuit did *not* hold that section 211-a is preempted. Nor did it hold that section 211-a is preempted as to "cost-based" obligations, the context that appears most analogous to AB 1889's program provision. Rather, the court held that the law is not preempted as applied to grants and remanded the case back to the district court for the development of a further factual record as to other forms of government funding. *Healthcare Ass'n* at 103-105, 109. In remanding the matter, the Second Circuit explained that, *"[t]o the extent* that the State applies section 211-a to burden the use of money that cannot be considered State funds, it burdens NLRA speech and satisfies the threshold conditions for *Garmon* preemption." *Id.* at 106 (emphasis added).

With respect to the remand, the Second Circuit reasoned that whether the New York law is preempted as applied to particular state expenditures that New York contends are "cost-based," such as New York's health care program, cannot be resolved without consideration of a number of factual issues: whether union-related spending affects the State's costs, whether the State has another feasible way to avoid such expenses, such as designating such costs as non-reimbursable, and whether the State has other feasible mechanisms to protect its interest in obtaining quality services with its funds. *Healthcare Ass'n*, 471 F.3d at 103-105, 109.[3]

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[3] Accordingly, contrary to petitioners' contention, the Second Circuit did *not* hold that the New York law is preempted as applied to "reimbursement for providing health care." Pet. 16. Nor did *either* the Ninth or Second Circuit decide that "the state's programmatic costs [for health care] cannot possibly increase by virtue of the employer's union-related expenditures." *Id.*

The Second Circuit further held that the determination as to whether the New York law is preempted under the *Machinists* doctrine "will depend on the same factors [the court] identified as determinative" in its *Garmon* preemption analysis. *Healthcare Ass'n*, 471 F.3d at 108.

Petitioners contend that *Healthcare Ass'n* conflicts with the en banc decision for essentially two reasons, a difference in analysis with respect to section 8(c) of the NLRA and a purported difference in treatment of state restrictions on "earned" money. Pet. 12-16. Petitioners' contention is without merit.

To be sure, the Second Circuit majority reasoned that section 8(c) renders certain employer speech "protected" in the sense that can trigger *Garmon* preemption. The Ninth Circuit reasoned otherwise. *Compare Healthcare Ass'n*, 471 F.3d at 97, 99-100, with Pet. App. 23a-25a. At this early stage, this difference in reasoning may turn out to be merely academic because the outcome in both cases, after remand, may be the same.

In fact, despite the differing analyses of section 8(c) with respect to *Garmon*, both circuits analyzed their respective state laws under the "arguably protected or prohibited" *Garmon* test set forth by this Court in *Sears*, 436 U.S. at 188. *Healthcare Ass'n*, 471 F.3d at 100-102; Pet. App. 25a-29a. And, the Second Circuit, consistent with the Ninth Circuit, concluded that the NLRA does *not* preempt restrictions on the use of money that *can* "be considered State funds," such as state grant money. *Healthcare Ass'n*, 471 F.3d at 102-103, 105 ("We conclude that, to the extent that *section* 211-a functions as a restriction on what use may be made of State grants, it is not preempted by *Garmon*.").

As for the New York law's application to cost-based obligations, the Second Circuit remanded the case to the district court for further factual development as explained above. In contrast, all that the Ninth Circuit held was that, on a facial challenge, AB 1889's restriction on state grant and program funds is not preempted by the NLRA. It remanded the matter to the district court for further proceedings. That the Ninth Circuit did not opine on the factors that may be relevant to as-applied challenges to particular programs that are subject to AB 1889 does not create a conflict between the two circuits. While it is possible that the two circuits may issue decisions that are in conflict following their review of remand proceedings, their decisions that are the subject of this petition are not.

Nor, as the petitioners suggest, did the Ninth Circuit hold that AB 1889 would not be preempted if it were applied to funds that petitioners characterize as being "earned." In referring to "earned" money, petitioners apparently mean to suggest, incorrectly, either that the en banc panel upheld the law as applied to ordinary contracts for the purchase of goods, pursuant to which an employer delivers a specified product in return for the state's payment, or that it has upheld the law as applied to employer profits earned from grants and state programs. In fact, the en banc court expressly clarified the limited scope of the issues and record on appeal in rejecting essentially the same contention when raised by the dissent:

> The dissent's parade of horribles goes far beyond the scope of plaintiffs' facial challenge to sections 16645.2 and 16645.7 and the record before us. The district court made no findings, nor is there evidence, that AB 1889 "co-opts the payment for goods and services and profit realized under a

> contract". . . . [T]he California statute, like various federal acts, requires only that those who accept government grant and program funds use them for the purpose for which they were given.

Pet. App. 34a.

For this same reason, no conflict exists with the Second Circuit's reasoning in *Healthcare Ass'n* that a spending restriction *would* be preempted as applied to "fixed-price contracts." *Healthcare Ass'n*, 471 F.3d at 106. Indeed, the en banc court made clear that it was not reviewing portions of AB 1889 that apply to state contracts. Pet. App. 34a n. 22.

Accordingly, just as the Second and Ninth Circuits are in accord that state laws prohibiting recipients of state grant funds from using those funds to support or oppose union organizing are not preempted by the NLRA, they are in agreement that the issues of whether and to what extent those laws are preempted by the NLRA with respect to other forms of state spending should be decided on the remand proceedings, or in separate, as-applied challenges, before the district courts. On the remand of both cases, further factual development will occur and legal issues yet to be decided will be resolved for the first time. The differences in non-dispositive reasoning between these two circuit decisions do not establish sufficient grounds for certiorari review. *Cf. Miroyan v. United States*, 439 U.S. 1338, 1339 (1978) (Opn. of Rehnquist, J., denying stay) ("While there is undoubtedly a difference of approach between the Circuits on the question, I am not sure that there is a square conflict, and I am even less sure that the granting of certiorari in this case would result in the resolution of any conflict which does exist.").

2. The Holdings of the Ninth and Seventh Circuits Are Not in Conflict

Despite petitioners' contention to the contrary, (Pet. 16-17), the Ninth Circuit's decision also does not conflict with the Seventh Circuit's decision in *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005). In that case, the Seventh Circuit considered a Milwaukee law mandating that county contractors enter into "labor peace agreements" with any union that wanted to organize employees who worked on a County contract. *Id.* at 277-278. The Seventh Circuit held that the law was preempted by the NLRA because the mandated labor peace agreements would, as a practical matter, necessarily apply to "disputes . . . *unrelated to any spending or procurement activity of the County.*" *Id.* at 279 (emphasis added). The law operated not only to limit the *funds* that contractors could use for certain activities, but to prohibit contractors from engaging in those activities *at all* with respect to their employees. *Id.* at 279-280. As the Seventh Circuit explained, "[i]t would hardly be feasible for the contractors to segregate their workforces, with one part governed by labor-peace agreements and the other not even though the two groups of workers would be doing identical work, just for different customers." *Id.* at 279.

The analogous situation would be presented here if the California law operated in such a manner as to require employers who received state grant or program funds to refrain from using their own private funds to support or oppose unionization. But the statute does not impose such a restriction; in fact, the Ninth Circuit indicated that such a hypothetical law would be preempted. Pet. App. 17a. Further, not only are there no factual findings in the record to support the contention, disputed by respondents, that AB

1889, in effect, restricts employers' use of their own funds, the fact that Congress requires similar restrictions on federal grant monies (*see* this Opposition at pp. 3-4) belies such a notion. Petitioners' reliance on *Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 is without merit and there is no conflict between the Ninth and Seventh Circuits.

The absence of any conflict between the Seventh and Ninth Circuits is further illustrated by Judge Easterbrook's opinion in *Northern Ill. Chapter of Associated Builders & Contractors v. Lavin*, 431 F.3d 1004, 1006-1007 (7th Cir. 2005), which held that conditioning grants for the renovation of fuel plants upon the grant recipients' entry into certain labor agreements was not preempted by the NLRA.

II. THE PROCEDURAL STATUS OF THIS CASE RENDERS IT A POOR CANDIDATE FOR CERTIORARI REVIEW

1. The En Banc Court Reviewed Only a Facial Challenge to the Grant and Program Provisions of AB 1889 and Significant Factual Disputes Have Not Yet Been Resolved

As the en banc court explained, on a facial challenge, the challengers' burden is to demonstrate that a statute cannot validly be applied under any circumstances. Pet. App. 7a (*citing Rust*, 500 U.S. at 183); *see also California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 577, 580 (1987) (to succeed in a facial preemption challenge, plaintiffs must show "there is no possible set of conditions the Coastal Commission could place on its permit that would not conflict with federal law").

Petitioners opine on how AB 1889 will be applied to participants in California's Medi-Cal program. Pet. 16. But the lower courts in this case did not evaluate AB 1889's grant and program provisions as applied to Medi-Cal or any other particular state program. Nor did the district court make any factual findings regarding how the complex Medi-Cal reimbursement program operates. *See, e.g.*, ER 60-67 (excerpts from the California Medicaid "State Plan" in effect in August 2002).

The district court also did not render factual findings as to petitioners' factual contention – disputed by respondents – that AB 1889 imposes significant compliance burdens on employers who wish to use their own funds to assist or deter unionization. *See, e.g.*, Pet. 23, 24, 26, 27. As the en banc court correctly pointed out in response to this contention, the record reflects "the absence of any finding by the district court that [the provisions at issue] are onerous," and the only expert testimony in the record (a declaration from a partner at an accounting firm) was that the law provides "employers 'flexibility in establishing proper accounting procedures and controls'" and that compliance with the statute "appear[s] to be significantly less burdensome than the detailed requirements for federal grant recipients." Pet. App. 4a-5a n. 2; *see* ER 99-10[illegible] (declaration of Nicholas Ross). Moreover, because petitioners are the parties who sought and obtained summary judgment below, on review all the disputed facts must be resolved against them. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 582 (1976).

Petitioners cite *FEC v. Massachusetts Citizens for Life, Inc.* (*Massachusetts Citizens*), 479 U.S. 238 (1986) to suggest that California law imposes overly severe accounting compliance burdens as a matter of law. Pet. 26. But

that case involved an "as applied" challenge by a small non-profit organization that did not engage in business activities to a campaign finance law that, in the court's evaluation, had "[d]etailed record-keeping and disclosure obligations" and "impose[d] administrative costs that many small entities may be unable to bear." *Massachusetts Citizens,* 479 U.S. at 241-242, 254, 263-264.

In contrast, this case presents a facial challenge only, and, unlike the law at issue in *Massachusetts Citizens*, the California law specifies that "[n]othing in [AB 1889] requires employers to maintain records in any particular form." Cal. Gov't Code § 16648. Moreover, as this Court has recognized, record-keeping requirements applicable to government subsidies do not impermissibly burden expressive activity. Indeed, in *Massachusetts Citizens*, this Court expressly distinguished *Regan v. Taxation Without Representation,* 461 U.S. 540, 545-546, in which this Court upheld the constitutionality of a federal requirement that non-profits establish a separate lobbying entity if contributions to the corporation for the conduct of other activities were to be tax deductible. *Massachusetts Citizens,* 479 U.S. at 256 n. 9. As this Court explained, *Regan* was distinguishable since "there is no right to have speech subsidized by the Government." *Id.*

2. The En Banc Court Did Not Rule that AB 1889 Restricts the Use of Funds "Earned" by State Contractors

Central to petitioners' legal challenge is their assertion that the California law attaches restrictions to funds that state contractors have "earned," and that now belong to the contractors. *See* Pet. 15 n. 2, 16, 27. But as explained earlier (this Opposition at pp. 13-14), the en banc

court expressly rejected this contention as beyond the limited scope of the issues and record on appeal. The court had only a facial challenge before it, and, further, AB 1889's restrictions on *contract* funds were not at issue. Pet. App. 34a.

The en banc panel also specifically noted in its decision that the respondents agreed at oral argument that "the fruit of the receipt of state grant or program funds" – for example, the reinvestment of a legitimately distributed corporate dividend – would not be subject to AB 1889's restrictions. Pet. App. 32a n. 20.

Moreover, neither the court below nor any state court has ruled that an employer's bona fide *profit*, even if derived from state funds from a grant or program that allows for a profit, would be considered "state funds" under AB 1889. There is no reason to presume that the courts would adopt an unreasonable interpretation of the statute. Indeed, both the federal and California courts follow the canon of statutory construction that statutes should be construed to avoid constitutional doubts. *See Clark v. Benitez,* 543 U.S. 371, 381-382 (2005); *People v. Davenport,* 710 P.2d 861, 870 (Cal. 1985). Accordingly, it is pure speculation to conclude that AB 1889 will ultimately be interpreted to restrict employers' use of bona fide profits legitimately earned from participation in a state program.

3. The Court Would Benefit from Development of This Case on Remand and Consideration of the Legal Issues Presented by Other Circuits

Petitioners' contention that "this Court needs to intervene now," Pet. 30, is without merit. At this juncture, the legal issues raised by the Petition have reached two circuits, and each circuit has remanded the case before it to the district court for further proceedings. Respondents respectfully submit that development of a much more extensive factual record and resolution of outstanding issues related to petitioners' NLRA preemption challenge should take place before this Court seriously considers reviewing a decision of the Ninth Circuit concerning AB 1889. Moreover, resolution of the remanded litigation in *Healthcare Ass'n,* 471 F.3d 87, would provide another opportunity for review of any later Second Circuit decision concerning the New York law at issue in that case.

Petitioners state that legislation similar to AB 1889 has been proposed in 15 other states. Pet. 29-30. In the event such legislation is enacted, affected employers will likely bring challenges that will lead to further development of the legal issues raised herein in nearly every other circuit court. Rather than granting review of the Ninth Circuit's decision that addresses a facial challenge only, in which the factual record has not been fully developed, this Court should allow for further percolation of the issues among the circuits to see if an actual conflict emerges.

III. THE EN BANC DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WAS CORRECTLY DECIDED

This Court has consistently upheld government restrictions on the use of its funds to subsidize speech when such restrictions have been challenged under the First Amendment. *See Rust*, 500 U.S. at 193-194, 203; *Lyng v. UAW*, 485 U.S. 360, 368-369 (1988); *Regan v. Taxation with Representation*, 461 U.S. at 549-551; *Cammarano v. United States*, 358 U.S. at 512-513.[4]

Notwithstanding such precedent, petitioners maintain that AB 1889's grant and program provisions improperly "burden[] employers' noncoercive speech," and therefore, the Ninth Circuit erred in its conclusion that AB 1889 is not preempted under the doctrines that this Court articulated in *Machinists,* 427 U.S. 132 and *Garmon*, 359 U.S. 236. *See* Pet. 19-20, 22. More specifically, petitioners contend that, in enacting AB 1889, California was asserting its spending power, a factor that this Court held was not in and of itself sufficient to avoid NLRA preemption in *Wisconsin Dept. of Indus. v. Gould* (*Gould*), 475 U.S. 282 (1986). Pet. 21-22. Petitioners' argument that the decision below is in conflict with *Gould* is without merit.

Gould involved a Wisconsin statute that prohibited the State from purchasing any products from vendors that had violated the NLRA. *Gould*, 475 U.S. at 283-284 & nn. 1-2. The law was preempted because the *Garmon* doctrine

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[4] By contrast, government spending restrictions may be unlawful if, unlike the AB 1889 provisions here, they preclude fund recipients from utilizing *private* sources of funds for expressive activities. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-547 (2001).

precludes a state from taking on the role of the NLRB by imposing additional penalties for violations of the NLRA. *Id.* at 288. In concluding that the Wisconsin statute was preempted, this Court held that state action is not immune from preemption simply because the government is acting through its spending power. *Id.* at 289.

Petitioners misinterpret the en banc decision below as holding AB 1889 facially constitutional simply because California is asserting its spending power. That is not the case. Rather, the en banc panel correctly recognized that, unlike the statute in *Gould*, the California law does not attach any conditions on receipt of its funds that relate to an employer's activities funded from private sources. Pet. App. 17a. Moreover, the California law restricts certain spending of state funds without regard to whether the activities that would otherwise be subsidized violate the NLRA. California has not penalized any activities related to union organizing; it merely has declined to subsidize such activities with state money.

The AB 1889 provisions at issue would be analogous to the Wisconsin law at issue in *Gould* only if California refused to award grant or program funds to organizations that assist or deter union organizing with their own private funds. As the en banc panel recognized, if AB 1889 had such a requirement, the state would, as in *Gould,* be improperly using its spending power to "'introduce some standard of properly balanced bargaining power' or to alter employers' private spending decisions." Pet. App. 17a (*quoting Machinists*, 427 U.S. at 149-50). As AB 1889's grant and program provisions do not condition the *receipt*

of state funds on employer neutrality, those provisions do not run afoul of *Gould*. *Id.*[5]

Further, Congress' adoption of the *same* type of spending restriction on use of federal grant and program funds "to assist, promote, or deter union organizing" similar to those in AB 1889 makes it unlikely that Congress would view such restrictions as operating to frustrate the purpose of the NLRA. Pet. App. 21a (*citing De Veau v. Braisted*, 363 U.S. 144, 156 (1960) (plur. op.)).

This Court has made clear that, when analyzing an NLRA challenge, "'[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.'" *Boston Harbor*, 507 U.S. at 224 (*quoting Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Moreover, the "'purpose of Congress is the ultimate touchstone' of preemption analysis." Pet. App. 12a (*quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (some quotation marks omitted)).

These principles further confirm that the Ninth Circuit decision is consistent with this Court's preemption jurisprudence. The NLRA does not require California to provide funds to employers that lack sufficient funds of their own to assist, promote or deter union organizing. The NLRA, therefore, should not be interpreted as requiring California to allow employers to redirect state grant and program funds for those purposes.

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[5] Similarly, petitioners incorrectly contend that the Ninth Circuit's "holding authorizes even *direct* regulation of noncoercive employer speech." Pet. 29; *see also id.* at 14. The en banc court's opinion emphasizes that the distinction between regulating the use of government money and directly regulating private activity is critical to its holding. Pet. App. 16a-18a, 25a, 31a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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